IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 309

AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES and CANADA and ASSOCIATED MUSICIANS OF GREATER NEW YORK LOCAL 802, ET AL., *Petitioners,*

v.

JOSEPH CARROLL ET AL., *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR PETITIONERS

HENRY KAISER
EUGENE GRESSMAN
GEORGE KAUFMANN
RONALD ROSENBERG
1730 K Street, N.W.
Washington, D. C.
Attorneys for Petitioners

Of Counsel:

EMANUEL DANNETT
JEROME ADLER
DAVID I. ASHE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 309

AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES and CANADA and ASSOCIATED MUSICIANS OF GREATER NEW YORK LOCAL 802, ET AL., *Petitioners,*

v.

JOSEPH CARROLL ET AL., *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

REPLY BRIEF FOR PETITIONERS

I

Nowhere in their papers do plaintiffs even suggest that the questions presented herein are unimportant. It deserves the emphasis of repetition, however, that the impact of the decision below is not limited to one industry or one union. The holding that union activities can be denied the labor exemption to the antitrust laws despite the absence of any combination with a non-labor group reverses the law as it has been estab-

lished since *United States* v. *Hutcheson,* 312 U.S. 219, with respect to all labor organizations. The holding that only activities relating to mandatory subjects of bargaining come within the labor exemption will jeopardize existing agreements and inhibit collective bargaining in all industries. The further holding that an agreement restricting an employer in his performance of employee work is not a mandatory subject of bargaining, affects not only musical club dates, but also trucking, the building trades, the garment industry, and numerous others where employers work at the trade.

While the questions presented thus merit review on the basis of their broad significance, we urge that the devastating impact of the decision below on petitioner unions is an additional ground for granting *certiorari.* As plaintiffs themselves point out, (Opp. p. 3)[1] the regulations invalidated deal with the most prevalent form of musical employment, club-date single engagements. As the trial Court found (Pet, pp. 72a-75a) and the Court of Appeals did not dispute, these regulations are essential to the preservation of job and wage standards in this segment of the musical industry. While the judgment below immediately affects only the four individual plaintiffs, it imposes on the unions the choice of abandoning historic and indispensable practices or facing years of further expensive litigation. In their Petition for Certiorari in No. 310 (p. 35), plaintiffs warn that similar suits

[1] Lest the Court be misled, however, we should note that the record is silent on the relative percentages of single and steady engagements, so that plaintiffs' figure (Opp. p. 3) is wholly spurious.

will be filed "in Chicago, Boston, Kansas City, Los Angeles, and other places". This is not an empty threat; such suits have already been filed in Chicago and Brooklyn.[2] Thus, the administration of justice would also be promoted by granting *certiorari*.

II

The first Question Presented by our Petition is whether union regulations can be denied the labor exemption in the absence of a finding that it has combined with a non-labor group.[3] Plaintiffs assert that that question does not arise in this case, claiming that the Court of Appeals did not find them to be members of a labor group. (Opp. pp. 9, 10) This contention is squarely refuted by examination of the Court of Appeals' opinion.

---

[2] *National Association of Orchestra Leaders, et al.* v. *American Federation of Musicians, et al.*, Northern District of Illinois, Case No. 67-C-917; and *Nat Brooks* v. *Associated Musicians of Greater New York, Local 802, American Federation of Musicians,* Eastern District of New York, Case No. 67 Civ. 706.

[3] In their Opposition to our Petition for Certiorari, plaintiffs make numerous factual assertions which are either contrary to the findings of fact of the District Court as approved by the Court of Appeals, or unsupported by any evidence in the record. They also address themselves to issues which do not appear to have any relation to the questions presented by our Petition. We think no purpose would be served by a reply to those misstatements, factual or legal, which do not bear immediately on those questions.

Nevertheless, we cannot leave unanswered the accusation that "plaintiffs Carroll and Peterson were expelled as a reprisal for the institution of the instant antitrust suits" (Opp. p. 9). This charge contradicts plaintiffs' allegations made in support of their application for a stay, which was denied by Mr. Justice Harlan, that the expulsions were for disobeying the price regulations here in issue. Both charges are false. See Findings 4 and 5 made by the District Court, after trial (Pet. No. 309, pp. 29a-30a).

In passing on the claim that the union violated the antitrust laws by establishing the minimum price which the leader must charge to the purchaser of the music, the Court of Appeals first addressed itself to plaintiffs' reliance on *Allen Bradley Co.* v. *Local 3,* 325 U.S. 797:

> "Under the appellants' view of this case, there is a conspiracy by the unions with 'non-labor' groups to engage in practices which are unlawful, because they are in restraint of trade. *But the facts do not support such a conclusion.*" Pet. p. 15a (emphasis supplied)

That the Court below determined leaders to be members of a "labor group" is likewise demonstrated by its holding that it is not a violation of the antitrust laws to compel them to join the union. In reaching this result, the Court of Appeals applied the test for identifying a "labor group" set forth in *Meat Drivers* v. *United States,* 371 U.S. 94: whether there is job and wage competition or other economic relationship between the regulated group and employees. Although the Court did not use the phrase "labor group" in this part of the opinion, it expressly approved the District Court's finding of job and wage competition between leaders and other musicians who concededly are employees.[4]

---

[4] Nor do any of the cases cited by plaintiffs (Opp. pp. 7-8) support their claim not to be members of a labor group. This concept bears only on the scope of the labor exemption to the antitrust laws. Since each of the cited cases arose under other statutes, they did not deal with this classification. Indeed, contrary to plaintiffs' implication, it remains an open question before the NLRB whether leaders in the club-date field are employees or employers. The parties stipulated to the leaders' status in the *Cutler* and *Glasser* cases, and the Board expressly withheld decision of the issue in *Republic Productions,* 153 N.L.R.B. 68, 69, n.2.

Faced with the test of union antitrust liability established by this Court's decisions, plaintiffs again deny the existence of such competition (Opp. pp. 9-10, 16, and 18-19, see also their Petition in No. 310, pp. 26-30). But they cannot escape the finding of such competition by both courts below. Plaintiffs also renew their attack on *Meat Drivers Union* v. *United States, supra* (Opp. pp. 21 and 23, n. 9).[5] If the Court below had agreed with plaintiffs' view that the language in *Meat Drivers* is mere *dictum* and had concluded that they were not members of a labor group despite the existence of job and wage competition between them and employees, such decision would plainly warrant review. All the more is it warranted here, where the Court, though following *Meat Drivers* to find leaders to be members of a labor group, took the broader position that the antitrust exemption is nevertheless unavailable. Plaintiffs appear to recognize the inconsistency between the holding of the Court below that the unions may not regulate the minimum compensation which leaders must receive and its other holding that the unions were privileged under the antitrust laws to compel leaders into membership. See their Petition in No. 310, challenging the latter. Organization of working employers is permitted and desired precisely in order to enable the union to regulate the conditions under which they may render their services.

---

[5] We are at a loss to understand plaintiffs' argument, (Opp. pp. 21-22) that Mr. Justice Stewart's concurring opinion in *Fibreboard Paper Products* v. *Labor Board*, 379 U.S. 203, 217, undermines the authority of his opinion for the Court in *Meat Drivers*, for the two opinions deal with entirely different issues.

III

The second Question Presented by our Petition is whether the union regulations were properly invalidated under the Sherman Act on the theory that they deal with a non-mandatory subject of bargaining. The Court of Appeals' major premise (with which Judge Friendly disagreed) was that the labor exemption to the antitrust laws applies only to regulations or agreements which relate to mandatory subjects of bargaining under the National Labor Relations Act. Plaintiffs say nothing which detracts from the propriety of review of this far-reaching holding.

In support of the Court's minor premise that the regulations here in question do not relate to mandatory bargaining subjects,[6] plaintiffs attempt to distinguish between agreements restricting the right of supervisors to perform bargaining unit work and those regarding performance of employee work by employers. (Opp. pp. 17-18). However, whether a subject is one respecting which the Act requires the parties to bargain depends on its impact on the working conditions of employees, which means in the present context whether it is designed to protect employees' jobs from competition. The effect on employees is, of course, the same whether their jobs are jeopardized by competition from supervisors or from working employers.

Plaintiffs place heavy reliance (Opp. p. 22-23) on Mr. Justice Stewart's concurrence in *Fibreboard Paper*

---

[6] Our Petition inadvertently misquoted the Court's opinion by omitting the second "not" from the following passage: "The cases make it clear, however, that price-fixing generally is not only not a mandatory subject for collective bargaining but is one toward which union activity may not be directed without violating the antitrust laws." (Pet. pp. 19a-20a). We apologize for the oversight.

Products v. *Labor Board* 379 U.S. 203, 217. We submit that they attribute to Mr. Justice Stewart a narrower view of the appropriate scope of collective bargaining than was taken in that opinion. For he and the other Justices who joined in his opinion agreed with the Court that subcontracting was a bargainable subject under the facts in *Fibreboard* because "all that is involved is the substitution of one group of workers for another to perform the same task in the same plant under the ultimate control of the same employer." 379 U.S. at 224. A provision which forbids an employer from performing employee functions qualifies precisely under this test since it substitutes "one group of workers for another to perform the same task". It in no way impinges upon those entrepreneural decisions which Justice Stewart thought to be outside the area as to which employers could be required to bargain, 379 U.S. at 223-224, although they would be permitted to do so, *id.* at 221, n. 6.

Moreover, it is, of course, the majority opinion in *Fibreboard* which is the governing precedent. The Court there held that "the replacement of employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment—is a statutory subject of collective bargaining under § 8(d)." 379 U.S. at 214. In reaching this result, the Court followed *Teamsters Union* v. *Oliver,* 358 U.S. 283, where the concern of the union was with the replacement of employees by the independent contractor himself. Because the price which the owner-operator charged for the rental of his truck had a direct impact on employee job opportunities, it was held to be a mandatory subject of bargaining. Here petitioners' concern with the competition of the leader is identical to that of the Teamsters

regarding the competition of owner-operator drivers; and petitioners' response is likewise identical, namely, the regulation of the independent contractor's remuneration.[7] Plaintiffs' sole comment on *Oliver* is that that case "concerned *wages,* not 'price-fixing', as the decision itself pointed out at page 294." (Opp. p. 15, plaintiffs' emphasis). But the very point of *Oliver* was that the test under National Labor Relations Act is not the form of the agreement, be it wages, prices or, as plaintiffs now emphatically proclaim (Opp. p. 19) *"profit",* but the impact upon employee job and wage standards. This was reiterated with respect to the antitrust laws in *Meat Cutters* v. *Jewel Tea,* 381 U.S. 676, 690, n. 5, the very case on which the majority below relied in declaring petitioners' regulations to be unlawful. We again submit (see Pet. pp. 14-15) that the present case is identical to and controlled by *Oliver,* and that the failure of the Court below to follow *Oliver* itself warrants review and reversal of its judgment.

Respectfully submitted,

HENRY KAISER
EUGENE GRESSMAN
GEORGE KAUFMANN
RONALD ROSENBERG
1730 K Street, N.W.
Washington, D. C.
Attorneys for Petitioners

Of Counsel:

EMANUEL DANNETT
JEROME ADLER
DAVID I. ASHE

[7] Plaintiffs allege, "Petitioners also misrepresent the price ingredients which they prescribe in their bylaws." (Opp. p. 8) Plaintiffs are in error. The description is in the words of the District Court finding which we cited (No. 79, Pet. p. 46a), which in turn adopted a stipulation of the parties.